BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	
Gary Development Co., Inc.	Docket #RCRA-V-W-86-R-45
Respondent	

BE IT REMEMBERED that heretofore, pursuant to agreement as to time and place and pursuant to Federal guidelines, the above-referenced cause came on for Trial before the HONORABLE J. F. GREENE, Administrator, U. S. Environmental Protection Agency, and reported by Vivian E. Jarrett, CSR, RPR-CP, a duly competent and qualified court reporter and Notary Public in the County of Lake, State of Indiana, on the 9th day of September, 1987, commencing at the hour of 11:15 a.m.

JARRETT COURT REPORTING
Certified Shorthand Reporters
5429 Broadway
Merrillville, Indiana 46410
Phone (219) 980-1700

A P P E A R A N C E S :

HONORABLE J. F. GREENE
Administrative Law Judge

Presiding Judge;

ATTORNEY MARC M. RADELL
ATTORNEY ROGER M. GRIMES
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

on behalf of U.S. EPA;

ATTORNEY WARREN D. KREBS
PARR, RICHEY, OBREMSKEY & MORTON
121 Monument Circle - Suite 503-507
Indianapolis, Indiana 46204

on behalf of Gary Development Co.

* * * * *

THE COURT: On the record. This is the matter of Gary Development Company, Incorporated, Docket Number V-W-86-R-45. I'd like a statement of appearances, please, from counsel, starting with the Government.

MR. RADELL: My name is Marc M. Radell. I'm counsel for the U.S. Government Environmental Protection Agency.

MR. GRIMES: My name is Roger Grimes, G-R-I-M-E-S, also counsel for the Government.

THE COURT: For the respondent?

MR. KREBS: For the Respondent, Your Honor, Warren Krebs from the law firm of Par, Richey, Obremskey and Morton, 121 Monument Circle, Suite 500, Indianapolis, Indiana. And I'd also like to advise the Court that with me today, sitting at the table, is Larry Hagan, who is the Vice President of the Respondent Gary Development; and also in the courtroom today with me is Dr. Terry West, who is a geological consultant for Respondent Gary Development.

THE COURT: It's been sometime since this complaint was issued and since we had pretrial exchange. I'd like a brief statement from each of the parties, setting forth what the relative positions are at this moment, whether there are stipulations or other such matters. Mr. Radell.

MR. RADELL: Yes, Your Honor. The parties were unable to enter into stipulations. U.S. EPA proposed such stipulations, pursuant to your pre-hearing exchange order; but respondent declined to enter into any.

I have a brief opening statement prepared,

which I would like -- which sets forth the facts to which EPA stipulates and the facts which respondent admitted in its complaint and how EPA views the remaining issues and how we intend to prove them.

Shall I proceed with that statement?

THE COURT: Well, yes, go ahead.

MR. RADELL: Thank you. As you know, this case concerns allegations of violations of the Resource Conservation Recovery Act, which were referred to as RCRA.

The EPA in its complaint alleges that Gary Development Company has accepted for treatment and disposal certain hazardous waste and does not have a permit or other operating status to dispose and treat these wastes; and therefore must close its facility, in compliance with the RCRA regulations and pay a penalty of $117,000.00.

In its answer to our complaint, Gary Development Company admitted that it conducts a sanitary landfill for the disposal of municipal and commercial refuge. EPA will prove today that Gary Development Company accepted

hazardous waste from disposal, after the date of May 19th, 1980, which means that it is subject to regulations by RCRA.

The complaint alleges that Gary Development Company accepted four different hazardous waste from three generators. The first of those wastes is listed Hazardous Waste Number F006, which is waste water treatment sludge from electroplating operations, listed for its characteristics of toxicity in the Indiana Administrative Code. This waste was generated by Jones and Laughlin Steel, Indiana Harbor Works, in East Chicago.

EPA stipulates at this time to withdraw all of all allegations in the complaint concerning Hazardous Waste Number F006, since it has come to EPA's attention that such waste was the subject of a temporary delisting order from headquarters during all relevant times of the alleged actions, and therefore is not subject to regulations.

The second waste which is referred to in the complaint is Hazardous Waste K087, decanter tar sludge. That is also listed for its

characteristics of toxicity in the Indiana Administrative Code and was also generated by Jones and Laughlin Steel.

Gary Development Company in its answer neither admits nor denies accepting and disposing of K087. EPA will prove that they accepted almost 300 million gallons of K087, between November of 1980 and March of 1982. We will do this by introducing manifest for those wastes, the generators and/or report of Jones and Laughlin Steel, by the testimony of Mr. Cooper and Mr. Warner.

The third waste which is the subject of the complaint is Hazardous Waste Number F005, paint sludge, which is listed for its characteristics of ignitability and toxicity. It is also listed in the Indiana Administrative Code. It was generated by American Chemical Services, Incorporated, which is a treatment storage disposal recycling facility in Griffith, Indiana.

In its answer, Gary Development Company admits that it accepted 33 shipments of paint sludge waste from American Chemical Services,

between January, 1981, and November of 1981. Gary claims that the waste was not listed as hazardous waste, but was merely characteristic by ignitability and that Gary treated such waste prior to disposal to remove ignitability.

EPA intends to prove that Gary Development Company accepted 37 shipments, which is over 120,000 gallons of such waste, between December of 1980 and November of 1981; that this waste is in fact F005, the listed waste, and not D001, the waste by characteristics of ignitability. We shall do this by introducing manifest and generator's annual report and the testimony of Misters Cooper and Warner.

We shall also admit that the treatment of -- excuse me -- we shall also prove that the treatment of such waste, to which Gary Development admits is in itself subject to RCRA regulations, that they should have gotten a permit for that.

The last waste which is a subject of the complaint is Hazardous Waste D008, which is waste that is characteristic for its EP toxicity contents in lead.

There are three such waste which constitute the D008; one is calcium sulfate sludge, which is neutralized battery acids; the second is rubber battery chips; and the third is reverb slag. These wastes were generated by U. S. S. Lead Refinery, Incorporated in East Chicago.

In its answer, Gary Development Company admits that Vice President Larry Hagan advised the Indiana State Board of Health that Gary accepted the calcium sulfate sludge and the battery chips, but claims that neither were hazardous.

EPA shall prove that they accepted over six -- excuse me -- over 760,000 gallons of calcium sulfate sludge, approximately 900 cubic yards of rubber battery chips, and over 200 cubic yards of reverb slag, between November 20th, 1980, and January of 1983; and that all of these wastes constitute hazardous waste D008, characteristic for its EP toxicity of lead. We shall do this by the testimony of Misters Cooper and Warner and introduce shipping manifest and waste analyses from

U. S. S. Lead.

Having proved that Gary Development Company is indeed subject to regulation by having accepted these wastes, EPA shall prove the other violations alleged in the complaint; namely, that Gary did not submit hazardous waste notification by August 18th, 1980. In its answer, Gary claims to be without knowledge as to this.

We shall also show that Gary did not submit a Part B hazardous waste application or the certification of groundwater monitoring and financial insurance requirements by November 8th, 1985. Indeed, we shall not have to prove these counts, since in its answer Gary admits that it did not submit a Part B for the certification. However, it denies that it was operating without interim status. We shall demonstrate our part of these claims through the testimony of John Cooper, who has reviewed the official files of EPA.

As for the interim status standard violations, which were observed in the inspections that are alleged in the complaint,

Gary Development Company denies those violations in its answer. EPA shall prove them today, through the testimony of Mr. Warner and the admission of inspection reports and related documents. Thus, EPA must prove only that Gary Development Company accepted hazardous waste, to demonstrate that Gary Development Company operated without a permit or interim status, since Gary Development Company admits that it did not submit a Part B or the necessary certifications that are prerequisite to operations. Therefore, Gary Development Company must close.

Finally, to support the proposed penalty of $117,000.00, EPA shall demonstrate the violations observed and the inspections, plus the fact that Gary was operating without interim status; and the potential harm that these violations may cause to the environment and to human health, due to the characteristics of the waste themselves and to the lack of sufficient groundwater monitoring or lack of the sufficient liner to protect the environment and human health. We shall demonstrate how

this penalty was calculated, in compliance with the RCRA Civil Penalty Policy, and we shall do that through the testimony of Mr. Cooper. That's all.

THE COURT: Mr. Krebs.

MR. KREBS: Your Honor, on behalf of the Respondent, in our opening statement we would like to point out, as has been stated by opposing counsel, that this case involves a complaint filed by U.S. EPA against the Respondent and indicating it was -- it's filed pursuant to Indiana law, that it says issued the complaint; and the EPA is seeking an order of this agency, the Federal agency, that Gary Development should comply with Indiana law, especially regarding groundwater monitoring and closure and post-closure.

The basis of this situation is that, I guess number one, Gary Development filed in November of 1980 a Part A RCRA application with U.S. EPA. The evidence will show that, indeed, U.S. EPA determined that Gary Development did not have interim status, even though it had filed a Part A application. And as the judge

is probably aware, normally interim status has been interpreted -- has been interpreted by the agency to really be a fairly automatic type of status, not really a permit situation, where the agency grants a permit, but an automatic status.

In this case, unlike any that I've previously dealt with, the Agency, the Federal Government, took the position early on -- as early as 1982, if not before, the evidence will show -- that this facility never had interim status. Nevertheless, as it is alleged in the complaint, EPA redevised, sent Gary a notice to submit a Part B application. I think that's a rather unique situation also, that a site which EPA considered never had interim status would then be required to file a Part A application, when its interim status -- under a Part B application, when its interim status under Part A had never been accepted and recognized by the same agency.

The allegations as to why this facility should be considered a RCRA facility are really, as summarized I think fairly accurately

by opposing counsel, that allegedly the facility took what is now called RCRA waste, some types of RCRA waste, in approximately the one year after RCRA became effective and after the permit application for Part A permit had been filed by the facility in November, 1980. We are contesting that. We believe that either of the waste that were accepted, number one, were not RCRA waste. One I believe they've stated -- and correct me if I'm wrong on that, that they are withdrawing their contention on that -- that it was a waste that was delisted by U.S. EPA, even though it is set forth in the complaint as being a RCRA waste. And we believe that the other waste either were not RCRA waste, were mismanifested by the companies, or that they just weren't RCRA waste to begin with; or, secondly, they didn't come to this facility.

We believe that the Government is attempting to prove waste came to this facility, which the manifest indicate on their face were never accepted by the facility. The manifest that we've been provided by the

Government in the pretrial documents indicate no signature of acceptance by Gary Development. They are merely documents where a company says that they are going to ship waste to a particular facility for disposal. But as the judge I'm sure is aware, that the manifest system for tracking contemplates a three-tier step; that is, the company puts on there where they are going to send their waste; the transporter is listed; and then there is an acknowledgment required as to where the waste was actually disposed of. The documents we were sent did not show acknowledgment by my client, that that waste was received in our facility. We're going to strenuously object to those documents coming into evidence, because of that problem.

That, basically, is the summary as to -- in general, as to why the Government believes that this site should be regulated under RCRA. The facts are that this site was approved by the State of Indiana, the predecessor to the present Solid Waste Management Board, which is in the Department of Environmental Management,

which are the present two state agencies that regulate this facility. Their predecessors specifically approved the construction of this site in 1974. That specific date, by the way, which will be discussed in the evidence, was June 19th -- I'm sorry, June 19th, 1973 -- I apologize; my years were confused -- 1973, June 19th, was when the facility was granted a construction permit to be where it's located.

Now, secondly, the State allowed the site actually to go into operation in 1974, in August, 1974.

Thirdly, previously, there -- the State required in a state administrative matter that Gary Development in 1980 submit a revised construction plan to build the site or construct the site in a manner different than the State had approved in 1973, okay, by the state permit; and Gary did that. And in 1980, specifically on November 14th, 1980, Gary Development submitted to the state agency at that time -- it is now, I believe, called the Indiana Environmental Management Board -- an application for a modification or amendment to

its construction plan on how the facility was going to proceed in future construction. That plan was approved by the Indiana Environmental Management Board on February 16th of 1982. On that date, the Environmental Management Board not only approved the new construction design for this facility, but also approved a new operating permit for this facility; renewed, if you will, the operating permit on the same date.

In connection with that, however, there were nine conditions that the State of Indiana, the Agency responsible in this area in the State of Indiana for regulations, placed upon this facility as to how it would operate and how it would be constructed. Let's refer to conditions as to items which the Agency felt the site should do, that weren't set forth in its application on how it was going to operate.

Gary appealed those nine conditions that the State of Indiana established in 1982 as to how this facility would operate. And in connection with that, there was entered into between the Respondent Gary Development and the

Indiana Environmental Management Board, who EPA now says that they're bringing this action on behalf of, there was an agreement entered into, which was approved by the full Indiana Environmental Management Board on February 18th, 1983. I have with me today, Your Honor, a certified copy of that particular decision of the Indiana Environmental Management Board.

Now, we have contended in our first response in our answer --

MR. RADELL: Your Honor, this was not mentioned, this entire train of argument was not mentioned in Gary Development Company's pre-hearing exchange.

THE COURT: Well, that's true; but I must hear the opening statements from counsel, Mr. Radell. And if you wish to be heard, I'll give you an opportunity.

MR. KREBS: I'm just going to set this here. I'm not asking the Court to -- or the Judge to read it at the present time, if the court chooses not to, just so that it's there. (Tendered.)

We did raise in our written answer that

this agency has no jurisdiction to hear this case. It has no jurisdiction over the Respondent Gary Development on the matters that have been raised, that's specifically in our answer, filed timely with the Agency.

The main crux of that -- there are two portions of the jurisdictional issue, there are two portions to that issue. The first is that this Agency in the case that I was involved in -- and I also have a copy of that decision here -- is a copy of the decision that was issued by EPA Administrator Lee in Northside Sanitary Landfill, RCRA Appeal Number 84-4, which is the decision which was binding upon this Agency, written by the Chief Administrator. In this decision, which was assigned by the Administrator on November 27th, 1985, the Administrator held that in matters where there is the dual roles of the state agency -- and I have a copy of that, it's merely a copy of the decision that was sent to me by the administrator -- the Administrator specifically held that in these matters, that if the State is authorized under Phase I, that

it is the role of the state to pursue closure matters and it is not the role of U.S. EPA. I would like to quote specifically from this decision. On page four, Administrator Lee holds, Indiana had been granted the authority to make closure determination pursuant to section 3006 of RCRA, a fact that was not brought to light in the parties' original submissions. Sections 3006(b) and (c) provide that when a qualified state receives authorization, the federal program is suspended and the hazardous waste program operates under state law. In this instance, Indiana received a so-called Phase I authorization on August 18th, 1982, which gave the State the necessary authority to approve the closure plan of any facility whose permit application has been denied by EPA. Under a Phase I authorization, EPA retains the authority to issue permits, period -- that is not the issue in this case -- and, therefore, was the proper authority to issue the permit denial. Again, that is not an issue in this case. This is not a situation where there is a permit denial.

However, the administrator goes on to hold, because the Phase I authorization -- because of the Phase I authorization, EPA was not the proper authority to decide which areas the facility should close; Indiana was.

The administrator goes on to hold at the bottom of page 6 of his decision, Indiana, not EPA, has the authority to approve Petitioner's closure plan, including the responsibility to decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover, because state law will supersede -- has superseded the federal closure requirements, 40 CFR 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations, corresponding to the federal requirements; and the closure plan must comply with the standard set out in Indiana law. Petitioner will therefore have the opportunity to present its argument to the state. The Region's statement that the Old Farm -- which is an area in the Northside case, specifically -- must close, cannot be viewed as

a final action imposing closure obligations on Petitioner, for the statement is without legal effect, as previously stated.

Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question, by requiring EPA to decide a state law matter, but would also undoubtedly duplicate the efforts of state officials. Inasmuch as Petitioner has not challenged its permit denial, but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations.

In this case, Your Honor, I argued to the EPA administrator on behalf of Northside Sanitary Landfill that we, Northside Landfill, was entitled to a hearing before EPA as to whether it should close and what portions of its facilities were required to close,

precisely the same issue that's involved in this case. In this case the Government is asking that you order this facility to close under RCRA; and the proceedings to determine whether it should close, to be made by this Agency. I argued that that was the law to the administrator, unsuccessfully. The administrator held that this is entirely a matter of state law in the Northside case, even to the point of reversing its prior decision which he had made six months previously, reversing himself and holding that the Government -- the Federal Government had no authority even to determine what portions of the site should close.

In this case the Government is arguing the opposite. They want this judge to order this facility, the 62 acres to close, precisely the same issue that was involved in the Northside case, which the administrator held that this Agency no longer has the jurisdiction to consider.

The decision in the Northside case was appealed to the U.S. 7th Circuit Court of

Appeals. I argued that case; I lost. The U.S. 7th Circuit Court of Appeals in a decision, of which I also have a copy of the slip opinion of the court with me -- I don't have the Federal 2d cite handy, but I can get it for the Court, if it desires -- but this case was Northside Sanitary Landfill versus Lee M. Thomas, who issued the decision I just quoted from. And in that case issued by the U.S. 7th Circuit Court of Appeals in Chicago, on Decem- ber -- I'm sorry, on October 23rd of 1986, the three-judge panel unanimously upheld the decision in this situation.

We appealed that we were denied due process, did not have the opportunity for a hearing before EPA, an evidentiary hearing like we're going to have in this case at this point; and we lost. That's what the law in this country is and it asserted that the administrator is right when he held that closure procedure -- not just the technicality of closure as to how many wells you might put in or what type of cover you may use, whether it's going to be synthetic, all those

details -- not just the details were a matter to be determined under state law, but the actual closure proceedings themselves; and, in fact, actually if the site and what portions of the site need to close under RCRA are a matter of state law that must be decided by the State of Indiana, and the EPA is precluded from making those determinations.

And now I have in this case the absolute opposite, 180 degree opposite position taken by Region V, from what the administrator ruled in the Northside case in precisely the same issue. So that is one prong of our argument that, respectfully submitted, that this judge, this Agency has no jurisdiction to rule upon all these things that they've asked you to rule upon.

If you look at what's requested in their relief, they don't even ask it to be a simple determination as to whether the site is subject to RCRA closure or not. They say they want this site ordered to put in so many monitoring wells, and they go through specifics on how they want those wells designed, specifically;

and they're asking this court or this Agency to make those decisions. They're asking that a groundwater plan, an assessment be submitted within a certain period of time. And the things here don't say just submit it to the State; they request these things be submitted to EPA, also. And, yet, EPA has given up the jurisdiction in this area by their own argument, argued by the Justice Department on their behalf before a Federal U. S. Court. And now, before this Agency, they want to argue that they can have their cake and eat it, too. And when the shoe is on the other foot and for a particular reason they decide they want to hold a hearing, then suddenly they now have jurisdiction and suddenly they can now have a court of the law and to put into evidence to determine what the State of Indiana in another case they felt was the exclusive body to make the decision on it.

The second prong of our case in jurisdiction is that this matter in its entirety is banned also by res judicata and collateral estoppel, which absolutely applies in these

federal proceedings; and I've sat up there for consideration the decision which I mentioned previously of the Indiana Environmental Management Board, signed, it's a certified copy. It's signed by the Attorney General's Office on behalf of the State of Indiana; it's signed by the hearing officer appointed by the Indiana Environmental Management Board; its signed by at that time the top executive of what was then the environmental agency in the State of Indiana, after it was approved by the full agency. And in that decision issued in February of '83, the manner in which this site is going to operate, its construction, items such as cover, leachate collection system, clay barriers, monitoring wells, many of the issues that the Federal agency is now attempting to address in this case on behalf of the State of Indiana have been determined, specifically.

Now, I would like to, in connection with this phase of the argument, provide to the judge -- by courtesy of the court library here in Gary, Indiana -- a case by the United States Supreme Court, 1981, Federated Department

Stores. This case addresses precisely this type of issue. This case was decided with only one dissenting opinion. The opinion was issued by Judge Renquist, not as Chief Justice, but who of course is Chief Justice now. There was only one dissenting opinion by the Supreme Court to this decision, and that dissenting opinion was by Justice Brennan. All the other judges either concurred in the opinion or wrote a concurring opinion.

And this case -- and I'm citing specifically from the U. S. Court site 398, at 401 -- Justice Renquist held, and I quote, there is little to be added to the doctrine of res judicata as developed in the case law of this court. A final judgment on the merits of an action precludes the parties or their privies -- which EPA is saying they are here on behalf of the State of Indiana to enforce state law -- or their privies from relitigating issues that were or could have been -- his words were or could have been -- raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits

altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply, "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." The Court of Appeals' reliance on public policy is similarly misplaced. This court has long recognized that "public policy dictates that there be an end to litigation; that those who have contested an issue, shall be bound by the results of the contest; and that matters once tried, shall be considered forever settled as between the parties." We have stressed that "the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts."

What we have here is in February, 1983, a settlement agreement and a consent order was entered into between the state agency -- which is in privity with EPA in this case -- and my client and approved by the Attorney General, the highest legal official in the State of Indiana.

Under Indiana law, and I will cite to you specifically the case -- I do not have a copy of that right with me -- in 1985 it was determined by the Indiana Court of Appeals in a case of Elder v. State of Indiana, that's E-L-D-E-R, Ex Rel Department of Natural Resources. The Department of Natural Resources is what I call a sister agency to the Environmental Agency in the State of Indiana. In that case, which was decided in October, 1985, it was determined that consent decrees are the same and have the full force in Indiana as do final judgments of the court, as long as they are approved by the full agency. And so the decision was in Indiana that if you have a consent decree, an agreed upon order, approved by agency and a party, that is just like having

a judicial decision.

And then if you look at the Federated Department Stores case, we have res judicata, not only on the specific issues determined in the order which I have provided to the hearing officer -- to the judge here, but also on any matters that could have been raised. It's absolutely what both the Indiana courts hold, Indiana Court of Appeals and the Supreme Court and the Supreme Court of the United States. Any matter that could have been raised is res judicata, and they had to have raised it in that state proceeding at that time.

Your Honor, everything that they are contending here predated the decision which is sitting in front of you now from this Agency, who the Federal Government is now arguing they are here on their behalf. They are arguing that matters have occurred in 1980 and 1981. This decision was issued in February -- February 18th, 1983, a year and a half to two years later. And it certainly is res judicata on all the issues that were raised, such as how the sites were to be operated, the manner of

coverage, etc., monitoring wells, but also on issues that could have been raised. In that decision, it even addresses one of the specific waste which is in their complaint here, the waste of Jones and Laughlin. It's specifically addressed in that case. And now we're going to relitigate that same waste here, because they've decided they've changed their mind, I guess, or the Federal Government is changing the State's mind on behalf of the State. The State is absent from this hearing. If this was such an important case for the State, number one, they could have brought it themselves, which they have not done and chosen evidently not to do. And, secondly, they should be here as a party in this case and representing themselves, if they have changed their mind and believe that this decision is not binding upon them and the Federal Government.

I would also like to cite specifically to the court regarding the issues of res judicata two other U.S. Supreme Court cases, which I will not belabor to cite specifically as far as the language in it. But in both Parklane,

P-A-R-K-L-A-N-E, Hosiery Company versus Shore, S-H-O-E-R, 439 U. S. 322, specifically between pages 326 and 333; and also in the decision of Blonder, B-L-O-N-D-E-R, and Tongue, T-O-N-G-U-E, Laboratories versus University of Illinois Foundation, found at 402 U. S. 313, specifically at page 334, the Supreme Court of the United States also held that offensive estoppel and collateral estoppel -- which as the judge knows are related to res judicata -- may be asserted by a party, even if he was not a party in the other cases. We can assert those under federal law in this case. That shows the Court or the judge how extensive res judicata is interpreted under federal law, which is binding upon this Agency.

That even if Gary Development was not a party to that decision which I have laid in front of the judge by the Indiana Environmental Management Board in February of 1983, we could still raise in this proceeding as offensive estoppel or collateral estoppel any matters that have been determined that involve this, even though we weren't a party. In this case

we were specifically a party, the State of Indiana was a party. There is no question and it's admitted in the complaint that there's absolute privity between the Federal Government, who is bringing this action here, and the State of Indiana.

On those two basis, we specifically in our answer objected to the jurisdiction of this Agency under this complaint, as filed. There's two parts to it. I've given the authority for both, and I think the law was without question on both issues. One is a decision of the present administrator of this Agency, affirmed by the 7th Circuit Court of Appeals, whose circuit Gary is in; and the second is a decision in the two other decisions by U. S. Supreme Court, written by the present -- in the 1981 case -- the present Chief Justice of that court concurred in, excepting one member of the U. S. Supreme Court, that collateral estoppel applied in these types of proceedings, that res judicata applies.

This action is totally barred. This Agency has absolutely no authority to drag my

client into this proceeding, when the State of Indiana has been specifically given Phase I authorization, and it's my understanding they've even been given Phase II authorization at the present time; not only on 265 regulations, but on 264 regulations. At least that's what the U. S. Justice Department argued in front of the 7th Circuit Court of Appeals, when he held all argument in the case which I have cited to the judge here. And I assume he was arguing correctly, when he got up on behalf of the Agency and the Department of Justice and said that Indiana at that date, even after Phase II operations, there was absolutely no excuse for this Agency filing this complaint; there is no excuse, whatsoever. They've argued absolutely the opposite in a case, successfully, against another one of my clients; and now they drag another one in, taking the absolute opposite position under the law.

The decision, Your Honor, that I've just cited to you -- and I'll get you the Fed. 2d cite on the the 7th Circuit case -- but the

cause number at the 7th Circuit was 85-21 of 19; and I do have copies of the slip decision for yourself and for opposing counsel. We are asking at this point that this case be dismissed for lack of jurisdiction, based upon the two legal issues we have raised.

THE COURT: Thank you, Mr. Krebs. Mr. Radell, you may respond.

MR. RADELL: Yes. The EPA would like to respond to these novel arguments; novel in the sense that they not only provide a new unintended twist to the law, but that they were never mentioned before to Complainant, so that they are new to Complainant. The EPA would also like to reserve its right to respond fully to these claims, if necessary, in a supplemental post-hearing brief, after we've had time to research the allegations.

Just by means of a brief reply, I would state that the Northside case applied to review of a closure plan. This, the instant case, concerns enforcing RCRA provisions, concerning the loss of interim status for the -- since this facility never had interim status, the

fact that they have to close, due to not having obtained interim status. Our complaint does not require approval of the closure plan by U. S. EPA, as Respondent alleges. It requires submittal of the plans to the Indiana Department of Environmental Management and submittal of a copy to EPA, to ensure the fact that Respondent is complying with the complaint. The complaint specifically says that Respondent shall -- request that Respondent implement the closure plan, as approved by IDEM. It does not refer to approval by U. S. EPA.

I also state that there's other case law, namely the Conservation Chemical Company of Indiana case in the Northern District of Indiana, which distinguishes this Northside case from other cases where EPA retains its authority and where to enforce closure and where the State has referred that action as to here, to U. S. EPA for enforcement.

As far as this agreement between Gary Development Company and the State of Indiana goes, the agreement does not even cite the

statute under which it was entered, so we are unaware of whether this purports to be entered under RCRA and even involve the same sorts of claims. It just deals with the Respondent's status as a sanitary landfill. It does not mention hazardous waste, which is the subject of our allegations. I would also point out that any authorization of the State of Indiana to run its program under RCRA, would not authorize it to enter into an agreement which would allow violations of RCRA which are clearly occurring at the facility. So, therefore, the agreement, if it does allow Respondent to operate in violation of RCRA, has to be invalid because it exceeds the state's authority under the state's agreement with U. S. EPA. And, similarly, those requirements -- arguments would apply to the res judicata argument, that since these claims are not the same claims that are in our complaint, then res judicata and estoppel does not apply in this case.

Once again, I would reserve our right to supplement this argument with a post-hearing

brief, if the judge feels it necessary.

THE COURT: Well, Mr. Radell, I understand Mr. Krebs to be arguing that if Indiana has been authorized to handle hazardous waste enforcement, the EPA is out of the business, altogether, with respect to this Respondent.

MR. RADELL: I would argue that the statute itself retains EPA's authority to take the enforcement action and authorize states, providing only that -- the only jurisdictional requirement being that the EPA notify the State. This is found in section 3008(a) of RCRA, and it is explained in more detail in the Conservation Chemical case to which I alluded earlier.

THE COURT: Now, how does the fact that the Northside case applied only to a closure plan? Distinguish it from this case, Mr. Radell.

MR. RADELL: Yes. I have not reviewed the case in depth; but with just a cursory review and past recollection of it having been discussed outside this proceeding,

that case concerns the review of a closure plan. It did not concern actually enforcing closure. It provided the specifics of the closure plan. Once again, I have to say that this is just my impression, and I reserve my right to supplement this with a post-hearing brief.

We allege many other things besides closure. We allege several violations with the interim status standards. We allege failure to submit groundwater monitoring requirement certifications and financial insurance requirement certifications. Those are violations which are independent violations under RCRA with independent sanctions and penalties assessed, which do not necessarily equal the closure implementation of an approved closure plan. And also we reserve the state's right and jurisdiction to review the closure plan explicitly and to review that request in the complaint.

I would like to read to Your Honor Section 3008(a)(2) of RCRA, which refer to EPA's jurisdiction in all of our states. It says in

the case of a violation of any requirements of this sub-chapter, where such violation occurs in a state which is authorized to carry out a hazardous waste program under Section 6926 of this title, the administrator shall give notice to the state in which such violation has occurred, prior to issuing an order or commencing a civil action under this section. That clearly implies, if it does not say so explicitly, that EPA retains the authority to take enforcement actions, so long as it notifies the state in an authorized state. And as part of our testimony today, EPA shall prove that EPA submitted that notification and it shall introduce into evidence a copy of our notification of this action to the State of Indiana.

THE COURT: All right, thank you. I'll withhold ruling on this for the time being.

MR. KREBS: Your Honor, may I respond briefly?

THE COURT: Yes, you may, Mr. Krebs.

MR. KREBS: I apologize for

interrupting, and I'll try to be brief on this. But I think that is very very important issue, and I think it's really silly to sit here and have hearings and call witnesses and subpoena people, which I've had to do, etc., if this Agency really is determined by its administrator that it really doesn't hear these kind of cases, anyway. So I think it is an important decision for this judge to make.

On the issue, opposing counsel has argued in his comments that we failed to raise this issue previously. First of all, without question in any court of law and applicable agencies, jurisdiction can be raised at any time in any proceeding. It can be the minute before the jury goes out, and we can decide that that court doesn't have jurisdiction. We don't have to raise this issue years in advance. Jurisdiction is the fundamental issue that can be raised at any time. You cannot waive raising jurisdiction, it's impossible. The Court either has it or it doesn't have it.

The second thing is, we did raise this issue. And in our answer -- not only we didn't

have to, but we did -- in our answer we said in paragraph one, and I'll quote on the first page, "Gary denies the jurisdictional summary set forth at page two of the complaint. It objects to the Region V's alleged attempts to enforce regulations of the State of Indiana and disputes both the subject matter and personal jurisdiction of Region V." I don't know how we could have been any more clear, unless we cited all the cases and started giving briefs and --

THE COURT: I don't have any problems with your having raised it, Mr. Krebs.

MR. KREBS: The second point I would like to raise is, the case by Administrator Lee was absolutely not as counsel is surmising, a case involving the technical parts of closure. It was a case determining whether closure would apply to what portions of the facility, the first issue. That's precisely what that case determined, and that's precisely what Region V is asking this judge to determine in this case, whether closure regulations apply to this facility. That's exactly the issue before the administrator. I argued that case, I was

involved in that case; and I can assure this judge that at that time there was no issue as to the details of a closure plan. I don't even think there was a closure plan filed at that time, to the best of my recollection. But that was not the issue. The issue was whether we, Northside Landfill as a regulated facility, was entitled to a hearing before a federal judge of EPA as to whether the facility would close and what portion of it would close. That's exactly the same issue that they're asking you to decide here.

The third thing is, they're not just asking you to decide that issue. They are totally excerpting the authority of the State of Indiana. And I hate to belabor the point; but, I mean, look at what they're asking for. If you specifically look in their complaint -- and I won't read it verbatim, but I would like to point out a thing in here. Page 13, under what they want in the order, they want that we be ordered to file closure plan and post-closure plan within 30 days. Okay, they want to determine the period. They say the

plan must describe activities will meet the requirements for a landfill closure and post-closure; submit to IDEM cost estimates, annual costs.

Next page, page 14, Section (b), Respondent shall within 30 days of this order becoming final submit to U. S. EPA and IDEM for approval a plan and implementation schedule, not to exceed 120 days, for a groundwater quality assessment program for the whole landfill, it goes on to read. Why is it being submitted to them for approval? It doesn't make any sense. I mean, I didn't write this document, if they are arguing that it's not specific.

The next page says -- in paragraph two on the next page, they say the proposed well system must consist of monitoring wells and they go on to describe what they specifically want. They even want to tell the State what they have to put in the closure plan and have this hearing officer or judge order that.

The next page, this is page 14, towards the top of the page, monitoring wells must be

cased in a manner that maintains the integrity of the monitoring wells or whole, and it goes on to describe how they want it done. They describe the sampling plans that they want, what they want in sampling plans. Everything in here reads like a closure plan. And they are specifically wanting this agency to do what, without question, the State of Indiana has been authorized to do. They are not even limiting the issue to the determination of whether closure applies to this site. They want a four-page, five-page order from this Agency as to what will be done and when it will be done. That's totally inconsistent with their position, not only in the prior decisions, but what they just argued here before in this case, absolutely inconsistent.

We think this matter should immediately be dismissed for lack of jurisdiction. If the State of Indiana feels that this facility -- RCRA closure applies, they have the absolute authority under Indiana law to proceed against this facility under administrative law in Indiana and the Indiana court system for appeal

process, whether we went or they went, and to determine this issue. That's the proper forum.

THE COURT: Mr. Krebs, would you address Section 3008(a)(2) of the act, where the Agency reserves the right to proceed, provided it gives notice to the state.

MR. KREBS: Okay. I would like to know how -- I guess my rhetorical question, my response to that is, it's the old thing, they want their cake and eat it, too. They cite a certain provision, which in the other decisions, you know, they wanted to ignore. Now, I don't -- you know, you read through regulations and through statutes and find some little clause that says, well, we think we can do anything because of this clause here. What I'm looking at is, instead of just looking at here's the statute and here's the regulations, is how has this Agency interpreted this regulation? How have they ruled on them? I mean, instead of looking at a little statute or a reg in a vacuum -- I mean I read the regs and half the time I don't know what they say. I mean, I read them one way, and I'm right

sometimes and found to be wrong other times.

What is important is what the Agency's policy is, how the Agency has interpreted these regulations, not a small sentence in hundreds of pages of regulations as to what this clause means standing by itself. I don't know how they've applied that clause. There's been nothing put forth in this complaint about why this Agency feels it has to proceed here and why the State hasn't. I mean, is there some problem? Is the state in misfeasance, are they not prosecuting environmental laws in the State of Indiana? I think the answer is no. They are processing -- enforcing environmental laws in the State of Indiana.

I have no idea why this Agency brought this case. If we get into the testimony, I intend to elicit that kind of testimony here for the record, as to why we're here. If there's a complaint filed, why did not the State of Indiana file a complaint, if there is a gross problem and this site should close under RCRA, when they had full force? I don't believe that EPA -- I don't know what section

of the statute they want to cite -- can come here and pick and choose and decide that one case in this state that they're going to take and they're going to have the hearing and go up to the U. S. 7th Circuit Court with the Department of Justice and argue that they don't have any authority to give us a hearing, when we request one. That's exactly what they were arguing to that court, and we were unsuccessful in arguing. They just can't have their cake and eat it, too. It's either one way or the other. And if that other case is wrong, then it -- you know, the Agency should have never argued that case. Maybe I should have appealed it in U. S. Supreme Court. We ran out of money, quite frankly, in that particular matter.

But for the Agency to come in here, after they've made representations to one of the higher courts, in this court successfully, and now say that now we have all of this authority to at least issue closure and determinations, we think this site should close under RCRA and we want these 62 acres closed, we want these

things filed within certain times, is just totally inconsistent.

I guess what I'm saying to your response is, I don't know. If that statute was applicable, it would have been applied in the Northside case and they were doing the exact opposite. I specifically argued this case, that they did not have this authority and would not give us -- refused to give us a due process hearing, refused to give us a hearing on precisely the same issue involved in this case.

THE COURT: Anything further, Mr. Radell?

MR. RADELL: Yes. I would maintain that the Agency is not trying to have its cake and eat it, too; but if it is our cake, we have a right to eat it. I would point out that in the complaint there sets out on page 13 that respondent shall prepare and submit the closure plan and post-closure plan to the Indiana Department of Environmental Management, with a copy to Complainant, the copy being to ensure that the Respondent is complying with the proposed quarter by complying with the State of

Indiana.

All the requirements that are listed here, requirements for the closure plan, are requirements taken from the Indiana regulations; and that on page 17 of the complaint, where it refers to implementation of the plan, then that's the only place where it refers to approval of the plan. It says Respondent shall implement the closure plan, after it has been approved by IDEM, as required by 320 IAC, etc. It does not refer to approval by U. S. EPA.

Something else came to my attention when I was reviewing the Northside Sanitary Landfill decision. That referred -- this decision in the petitions under -- and the facts of this case apply to a RCRA permit proceeding. Apparently, Petitioner was denied a permit by the State of Indiana and somehow tried to appeal that permit to the U. S. EPA. So right there, I would like to distinguish the facts here. This is not a permit proceeding. This is a 3008(a) proceeding.

And also, as counsel for Respondent

stated, the Northside case considered which units at a facility should be closed, the underlying assumption being that the facility itself should close. In this case we are trying to determine that the facility itself must close, and it will be entered as such in the closure plan approved by the State of Indiana exactly which units within the facility must close and how they must close. We are addressing the broad issue of the closure here, but it will be the State of Indiana which determines which units within the facility must close and exactly how they must close.

And, furthermore, I would like to say that in the complaint we set forth all the basis for our jurisdiction as we believe them; and that the appropriate way for Respondent to contest that was through a motion to dismiss, perhaps shortly after receiving the complaint and not at this point.

MR. KREBS: Your Honor, I apologize for the exchange, but it's totally incorrect what counsel is saying. The Northside case did not involve a situation where the company was

appealing a permit denial, they wanted a permit. That company had withdrawn its permit application. It's just totally untrue. I mean, that's not what happened in that case. That case involved the language in the permit denial where Region V, the same Region V here, ordered the facility to close under RCRA. That's what the issue was, that went up to the administrator. It was not an appeal of the permit itself, whether the landfill should have or should not have a permit. The landfill had withdrawn its permit application, Part B application. The question was exactly the question that's in front of you.

THE COURT: Thank you. My microphone goes off and on, just like the judge said.

I haven't read the Northside Landfill case for about a year. It's been about a year since it came out. So I will at least take the opportunity to review the materials that you've presented, Mr. Krebs. But and in the meantime, I think we should proceed.

Now, I would like to consider documents offered by the Government. I understand there

will be some objections to them. If you'd like, you can take them one at a time, unless you prefer to proceed through your witnesses with them. I would like to take them now, Mr. Radell.

MR. RADELL: Well, it's up to you, Your Honor.

THE COURT: Then let's start with number one.

MR. RADELL: I can enter it through the course of my testimony I do. Part of it is what's laying the foundation for each individual exhibit, since some of them do have different basis for admission. But I would just like to point out that even though the rules of evidence are a guideline to the admission of evidence in administrative proceedings, that 40 CFR, Part 22, makes it clear that all relevant documents must be admitted.

THE COURT: Yes, I'm acquainted with the rule. If you wish to proceed that way, that's perfectly all right. You may call your first witness.

C E R T I F I C A T E

I, VIVIAN E. JARRETT, CSR, RPR-CP, a Notary Public for aforesaid County of Lake, State of Indiana, and a competent and duly qualified court reporter, do hereby certify that there came on for TRIAL before the HONORABLE J. F. GREENE, Administrator, U. S. Environmental Protection Agency, on the 9th day of September, 1987.

I further certify that I then and there reported in machine shorthand the testimony so given at said time and place, and that the testimony was then reduced to typewriting from my original shorthand notes, and the foregoing typewritten transcript is a true and accurate record of said testimony.

I further certify that I am not related by blood or marriage to any of the parties to said suit, nor am I an employee of any of the parties or of their attorneys or agents, nor am I interested in any way, financially or otherwise, in the outcome of said litigation.

I further certify that after said Trial a partial transcript had been so transcribed.

WITNESS MY HAND and SEAL this 14th day of September, 1987.

Vivian E. Jarrett

VIVIAN E. JARRETT, CSR, RPR-CP
COURT REPORTER & NOTARY PUBLIC

My Commission Expires 12/20/89

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

2

In the Matter of:	
Northside Sanitary Landfill, Inc.	RCRA Appeal No. 84-4
Docket No. IND050530872	

ORDER ON RECONSIDERATION

On April 19, 1985, Northside Sanitary Landfill, Inc. (Petitioner) moved for reconsideration of the Administrator's Order Denying Review dated April 3, 1985.

The Order Denying Review correctly concluded that the issue raised by Petitioner should not be reviewed under 40 CFR §124.19. Nevertheless, reconsideration is warranted to revise and clarify the legal basis for the denial of review and to respond to Petitioner's claims that it has been denied the opportunity for a hearing.

In the original petition filed under 40 CFR §124.19 (1984), Petitioner requested review of EPA Region V's "response to comments" issued in conjunction with the denial of Petitioner's final RCRA permit.[1/] Petitioner requested review for the pur-

1/ Letter (petition), dated November 8, 1984, from John W. Bankert, Sr., President, Northside Sanitary Landfill, Inc.

pose of having the response to comments restated "to correctly reflect that the 'Old Farm Area' is not included in Northside's Interim Part A Permit, and hence should not be subsequently referenced in a Closure Procedure . . . . No reference to the 'Old Farm Area' was made in the Part A Interim Permit and/or Application." Petitioner twice stated, however, that it was not objecting to EPA's final decision to deny the permit. EPA Region V responded to the petition and urged denial of review on the grounds that (i) Petitioner is not entitled to have the permit decision reviewed since it is not contesting the denial of the permit, and (ii) the Old Farm Area should be subject to the closure requirement because Petitioner, in its RCRA Part A permit application, clearly delineated its hazardous waste facility, on diagrams and an aerial photograph, as including the Old Farm Area.[2/] Petitioner responded, arguing that (i) EPA's finding regarding the Old Farm Area is subject to review under 40 CFR §124.19; and (ii) Region V "has argued 'out of context' the hand-drawn map . . . and the photograph contained in Northside's hazardous waste permit application of November 25, 1980."[3/]

As the issue was thus framed by the parties' submissions on appeal, there appeared to be a dispute over the location of the facility's boundaries, that is, did the Old Farm Area fall

---

2/ EPA Region V Response, filed January 11, 1985.

3/ Petitioner's Response to Region V's Response, dated January 22, 1985.

within the boundaries of the facility? EPA argued that it did and Petitioner argued that it did not. Both parties appeared to assume that inclusion would mean that the Old Farm Area had to be closed in accordance with the RCRA requirements governing closure of hazardous waste facilities. Petitioner opposed such a result, contending that no hazardous waste activities took place at the Old Farm Area, and, therefore, according to Petitioner, closure of that area should not be required. Region V, on the other hand, favored closure irrespective of the presence or absence of these activities, for it took the position that closure must be effected throughout the entire facility unless the hazardous waste portions were segregated from adjacent non-hazardous waste portions -- which they were not, according to Region V.

In my April 3, 1985 Order Denying Review, I held that the issue of the facility's boundaries was reviewable but I denied review on the grounds that Petitioner did not sustain its burden of showing that the Region's permit determination was clearly erroneous or otherwise subject to review. In ruling that the issue of the facility's boundaries was reviewable, I made the following observation regarding the importance of the issue raised by the parties:

> I agree with petitioner that it has raised an issue which is reviewable under §124.19. The location and dimensions of a hazardous waste facility are probably two of the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit decision cannot be implemented successfully

> regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and post-closure requirements of the regulations, 40 CFR Part 265 (Subpart G). Therefore, even though Petitioner has stated that it does not object to the denial of its permit, I am persuaded that the matter which Petitioner is raising is such an integral part of the permit decision that it is the kind of matter which can be reviewed under §124.19. [Footnote omitted.] .4/

On reconsideration of the April 3 Order, it appears that the foregoing language is being construed by the parties to mean or imply that Region V had the authority to determine the scope of closure procedures during the course of the permit denial proceedings. Any such construction of this language is in error in the context of this case because Indiana had been granted the authority to make the closure determination pursuant to §3006 of RCRA, a fact that was not brought to light in the parties' original submissions. Sections 3006(b) and (c) provide that when a qualified state receives authorization the federal program is suspended and the hazardous waste program operates under state law. In this instance, Indiana received a so-called Phase I authorization on August 18, 1982, which gave the state the necessary authority to approve the closure plan of any facility whose permit application has been denied by EPA. See 40 CFR §271.128(e)(2). Under a Phase I authorization EPA retains the authority to issue permits 5/ and, therefore, was

---

4/ Order at 2-3.

5/ See 40 CFR §270.1(c).

the proper authority to issue the permit denial. However, because of the Phase I authorization, EPA was not the proper authority to decide which areas of the facility should close -- Indiana was. Consequently, to the extent that Region V's response to comments purports to make findings regarding whether or not the Old Farm Area must be closed, those findings are without legal effect, for any such findings are for Indiana to make pursuant to its Phase I authorization.

Also, on reconsideration of the April 3 Order, I conclude that it wrongly implies that any area that is part of the facility for permitting purposes must automatically be closed if the permit for the facility is denied. Any such implication is in error because it would ignore the crucial distinction between permit determinations, which decide whether and under what conditions waste may be managed on the property, and closure determinations, which are concerned with which areas were used for hazardous waste management and what specific technical requirements, such as cover or maintenance requirements, should apply to those areas. In the case of permit determinations, the geographic area of the "facility" is not limited to the areas of the property where hazardous wastes are currently managed but rather include all contiguous property under the owner or operator's control. The property boundary of this area defines the area where the owner or operator is authorized to treat, store or dispose of hazardous waste; and it represents the broadest extent of EPA's jurisdiction under sections 3005(a)

and (e) of RCRA. See 47 Fed. Reg. 32288-89 (July 26, 1982); 50 Fed. Reg. 28712 (July 15, 1985). Closure determinations, in contrast, are likely to be more limited in geographic scope, since they are concerned with the areas within the boundaries of a facility that are actually used for hazardous waste management, thus ensuring that any hazardous waste remaining after closure does not pose a threat to human health or the environment. See 40 CFR §265.111. Accordingly, the closure regulations in general only burden areas of the facility where treatment, storage, or disposal operations took place after November 19, 1980, i.e., the date EPA's closure regulations took effect. See 45 Fed. Reg. 33,170, 33,197 (May 19, 1980). Consequently, identifying the boundaries of a facility for purposes of a permit denial does not necessarily define the areas of a facility that must be closed pursuant to a closure plan.[6/]

In view of the foregoing, Petitioner's claim that it has been denied an adequate hearing on the closure determination must be rejected. Indiana, not EPA, has the authority to approve Petitioner's closure plan, including the responsibility to

---

6/ Although EPA's closure regulations refer to closure of the "facility," see, e.g., 40 CFR §§255.111, 265.112, the more specific references to individual types of units, such as waste piles and landfills, make it clear that closure was meant to apply only to the areas that are actually used for hazardous waste management. 40 CFR 265 (Subpart L -- waste piles) and (Subpart N -- landfills). The preamble to these regulations confirms that the specific requirements were generally meant to apply only to areas of actual use. See 45 Fed. Reg. 33,170-171 (May 19, 1980). Hence, "facility" in the context of closure refers to the land, structures, and other property and equip-

(next page)

decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover. Because state law has superseded the federal closure requirements, 40 CFR Part 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations corresponding to the federal requirements, [7/] and the closure plan must comply with the standards set out in Indiana law. Petitioner will therefore have the opportunity to present its arguments to the state. The Region's statement that the Old Farm Area must close cannot be viewed as a final action imposing closure obligations on Petitioner, for the statement is without legal effect as previously stated. [8/]

(Footnote No. 6 cont'd)

ment used for hazardous waste management, not to the fullest extent of EPA's statutory jurisdiction under sections 3004 and 3005 of RCRA. See 40 CFR §260.10.

7/ The federal regulations contemplate that closure requirements for a facility will be determined separately, after the permit denial proceedings have been completed, 40 CFR §265.112 (c)(1). The owner or operator has the opportunity for comment and possibly a hearing before adoption of any final closure plan, 40 CFR §265.112(d).

8/ At most, the Region's response in this case informed the applicant and interested parties of EPA's opinion on an issue raised at the public hearing on Petitioner's permit denial. Furthermore, there is no reason to suppose, as Petitioner appears to, that EPA's finding will preclude the state from making its own finding based on the evidence submitted to it. It is well settled that an administrative agency's factual determination provides a basis for collateral estoppel only if the agency is acting in a judicial capacity and reaches a final determination

(next page)

Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question -- by requiring EPA to decide a state law matter -- but would also undoubtedly duplicate the efforts of state officials. Inasmuch as Petitioner does not challenge its permit denial but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. Indeed, Petitioner admits that some of the information it wishes to submit to EPA has already been submitted in state proceedings. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations. 9/

For the reasons stated, the April 3, 1985 Order Denying Review is revised and clarified as follows: Region V's findings

---

(Footnote No. 8 cont'd)

of an issue properly before it, when the parties have fair opportunity to litigate the issue and to obtain judicial review. See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978). As these principles reveal, Petitioner's fears that the Region has usurped the state's authority are groundless. Here, there was no formal hearing: the Region made its statement in response to a comment made at an informal public hearing. The Region's finding relates to an issue which is properly before the state, not EPA, and which is not reviewable as part of EPA's permit decision. The state is free to exercise its regulatory authority.

9/ When a state has been authorized to administer some but not all of the hazardous waste management program, EPA should attempt to organize administrative procedures so as to avoid conflict with state decisionmaking authority and minimize duplication and overlap as much as possible.

respecting closure of the Old Farm Area, which are set forth in the Region's "response to comments" accompanying the denial of Petitioner's permit, are without legal effect, for Indiana, not EPA, is the proper authority to make closure determinations respecting Petitioner's facility, including approval or disapproval of Petitioner's closure plan. Therefore, no purpose would be served by granting Petitioner's request for a hearing. In all other respects, the Order Denying Review is affirmed and the petition for review is denied.

So ordered.

Lee M. Thomas
Administrator

Dated: NOV 27 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order On Reconsideration in the matter of Northside Sanitary Landfill, Inc., RCRA Appeal No. 84-4, were mailed to the following:

By 1st class mail, postage prepaid:

Valdas V. Adamkus
Regional Administrator
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Robert E. Leininger
Assistant Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Warren D. Krebs, Esq.
PARR, RICHEY, OBREMSKEY & MORTON
121 Monument Circle, Suite 500
Indianapolis, IN 46204

John W. Bankert, Sr.
President
Northside Sanitary Landfill, Inc.
985 South State Road 421
Zionsville, IN 46077-9791

Eileen J. Barnhardt

Eileen J. Barnhardt
Secretary to the Chief
Judicial Officer

Dated: NOV 27 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

3

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	Civil No. H 86-9
CONSERVATION CHEMICAL COMPANY OF ILLINOIS; and NORMAN B. HJERSTED, Defendants	)	

O R D E R

This matter is before the court on a Motion to Dismiss filed by defendants Conservation Chemical Company of Illinois ("CCCI") and Norman B. Hjersted on January 5, 1987. Plaintiff United States Environmental Protection Agency (the "EPA") filed in opposition on January 13, 1987 and the defendants filed a reply brief on January 26, 1987. The EPA also filed a supplemental memorandum in support of its position on February 11, 1987 to which the defendants responded on February 1, 1987.1/

The EPA brought this action on January 6, 1986 against the defendants for alleged violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"or the "Act"), codified as amended at 42

1/ An earlier motion to dismiss was filed by the defendants on February 5, 1986 and was fully briefed by the parties. However, because the grounds for the first motion to dismiss are included in the more recent filings, the court will consider the two motions together.

U.S.C. §§6901-6991. The defendants seek dismissal of certain claims on the grounds that: the claims for injunctive relief are moot; the EPA enforcement process should be stayed pending a state agency's procedure; the EPA has no authority to bring an action to enforce closure requirements; and, defendant Hjersted is not personally liable for any alleged violations.

I.

A. Statutory and Regulatory Guidelines [2/]

In the closing days of the 94th Congress in late 1976, Congress passed the Resource and Recovery Act ("RCRA"), Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991). RCRA adopted a multifaceted approach to solid waste management. It mandates federal regulation of hazardous waste, strongly encourages solid waste planning by states, and funds resource recovery projects.

In particular, §§3001 through 3013 of RCRA, codified as amended at 42 U.S.C. §6925(a), provide that "the Administrator shall promulgate regulations requiring each person owning or operating an existing (hazardous waste disposal) facility ... to have a permit issued pursuant to this section." Section 3004 of RCRA, codified as amended at 42 U.S.C. §6924(a), requires that the Administrator "promulgate regulations establishing such per-

---

2/ The following discussion of the statutory and regulatory scheme of RCRA is taken almost in its entirety from Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371, 373-75 (7th Cir. 1986).

formance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous wastes ... as may be necessary to protect human health and the environment."

Recognizing that the EPA could not issue permits to all hazardous waste applicants before the effective date of RCRA, Congress provided that, under §3005(e) of the Act, the Administrator promulgate regulations that allowed the owner or operator of a hazardous waste management facility that was in existence on November 19, 1980, to file a "Part A application," and to continue hazardous waste disposal pending the final administrative action on the facility's application. The Part A application calls for minimal information concerning the nature of the applicant's business, a description of the hazardous waste management processes it employs, a specification of the types of hazardous wastes processed, stored, or disposed of at the facility, as well as maps, drawings and photographs of the facility's past, present and future waste processing areas. Id. §270.13. If the Administrator finds no reason to believe that the Part A application does not meet the disclosure requirements and once it has filed a Part A application and given proper notice of hazardous waste activities, an existing facility "shall have interim status and shall be treated as having been issued a permit." 42 U.S.C. §6925(e); 40 C.F.R. §270.70. The operation of a facility that has been granted interim status is limited to the types of wastes, as well as the processing,

storage, and disposal procedures specified in the Part A application. Under 40 C.F.R. §270.71, the facility must comply with the operating standards set forth at 40 C.F.R. Part 265. A facility's interim status terminates either upon final administrative disposition of a permit application, 40 C.F.R. § 270.73(a), or upon failure of the operator to furnish the full information required by the Part B application, as described below. 3/

Following the approval of a facility's Part A application and the grant of interim status, the facility must file a "Part B application" with the EPA. The Part B application calls for detailed information, including chemical and physical analyses of the hazardous waste treated at the facility, a description of procedures for preventing contamination of water supplies, a determination of the applicable seismic standard for the facility, a determination whether the facility is located within a flood plain, and data relating to groundwater monitoring. Id. §270.14. The applicant must also furnish information concerning its use of hazardous waste containers, storage or disposal tanks, surface impoundments, waste piles, incinerators, land treatment facilities, and landfills. Id. §§ 270.15-270.21. Upon

---

3/ Under the 1984 amendments to the Act, a facility that had been granted interim status before November 8, 1984, shall have that status terminated on November 9, 1985, should the facility fail to apply for a final determination regarding the issuance of a permit pursuant to 42 U.S.C. §6925(c) (Part B application) before November 9, 1985, and to certify that it is in compliance with all applicable groundwater monitoring and financial responsibility requirements. 42 U.S.C. § 6925(e)(2) (as amended by P.L. No. 98-616, 98 Stat. 3221).

successful completion of both the Part A and Part B application, an owner is issued a hazardous waste permit, and is required to comply with the standards set forth in id. §§264.1-264.351 ("Part 264").

A facility that has been approved for interim status operation must prepare a written closure plan, a copy of which must be kept at the facility. Id. §265.112. The purpose of the closure plan is to "protect human health and the environment, (to prevent) post-closure escape of hazardous waste, hazardous waste constituents, leachate, contaminated rainfall, to (protect against the escape) of waste decomposition products to the ground or surface waters or to the atmosphere." Id. §265.111(b). Once closure has been ordered, the owner or operator of the facility must terminate operations in a manner that minimizes the need for further maintenance of the facility. Id. § 265.111(a).

A closure plan must "identify the steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life." Id. §265.112(a). In addition, the closure plan must provide for post-closure care for a period of thirty years after the facility is closed. Id. § 265.117(a). Post-closure measures include ground-water monitoring, maintenance of other monitoring and waste containment systems, and periodic reporting. Id. §265.117. The plan may be amended as changes in the operation of the facility so dictate. Id. § 112(4)(b).

The owner or operator of a hazardous waste management facility must submit a closure plan to the appropriate EPA regional administrator at least 180 days before the date the facility is expected to begin closure. Id. §112 (4)(c). However, if the EPA has terminated the facility's interim status and has not issued a hazardous waste permit for the facility, the closure plan must be submitted to the EPA no later than fifteen days after interim status is terminated. Id. § 112(4)(c)(1). The public is provided an opportunity to comment on the submitted plan. Id. § 112(4)(d). The regional administrator must approve, modify, or disapprove the closure plan within ninety days of its receipt. The owner or operator of the facility is given sixty additional days to modify or prepare a new plan should the Regional Administrator have modified or rejected the original plan. Id. Whatever modification or revision the Regional Administrator then makes of the operator's revised plan shall become the approved closure plan. Id.

Section 3005(c) of the Act, codified as amended at 42 U.S.C. §6925(c), provides that a state environmental agency, as authorized by the Administrator pursuant to 42 U.S.C. §6947(a), is responsible for the issuance of hazardous waste management permits. Section 3006 of the Act, codified as amended at 42 U.S.C. §6926, provides that a state may apply to the Administrator for authority to develop and enforce a hazardous waste program "in lieu of" a federal program and federal enforcement.

Despite this delegation to states, it appears that Congress intended for the EPA to retain ultimate authority over the provisions of RCRA by empowering it with broad enforcement jurisdiction. Section 3008(a), codified as amended at 42 U.S.C. §6928(a), authorizes the EPA to bring enforcement action to enjoin any violation of RCRA. This provision states:

> (1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. §6928(a)(1).

The exception set forth in paragraph (2) concerns states like Indiana which have been authorized by the EPA to administer its own hazardous waste program. The only limitation placed upon the EPA in bringing an enforcement action in a RCRA-authorized state is that the EPA must first provide notice to that state. Section 3008(a)(2) provides:

> (2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

42 U.S.C. § 6928(a)(2).

C.F.R. §§271.1-271.137 ("Part 271") sets forth the requirements for authorizing state programs. Under these regulations, a state may obtain "interim authorization" in two "phases." Phase I tracks the regulations of 40 C.F.R. §§265.1-265.430 ("Part 265"), and authorizes the state agency to, among other things, conduct closure proceedings for interim status facilities. See Id. § 265.28. Once a state obtains Phase I authorization, its regulations and procedures displace the federal interim status regulations. Phase II authorization allows the state to issue permits under standards corresponding to those found in Part 270, and to enforce standards corresponding to those found at Part 264.

Section 7006(b) of the Act, codified as amended at 42 U.S.C. §6976(b), provides that "[r]eview of the Administrator's action ... in issuing, denying, modifying, or revoking any permit ... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person ... . Such review shall be in accordance with sections 701 through 706 of Title 5." If a party has been aggrieved by the action of an authorized state agency, review of the agency's decision shall be had in accordance with the applicable state regulations.

B. Facts

In setting out the facts of this case, the court must be mindful of the present procedural posture; this matter is before the court on a motion to dismiss. Dismissal of a claim for relief is proper under Fed.R.Civ.P. 12(b)(6) only where it appears beyond a doubt that the plaintiff can prove no set of facts which would support that claim. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed. 2d 80, 84 (1957); Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732, 735 (7th Cir. 1986); Papapetropoulos v. Milwaukee Transport Services, 795 F.2d 1299, 1303 (7th Cir. 1986); Action Repari, Inc. v. American Broadcasting Co., 776 F.2d 143, 146 (7th Cir. 1985). For purposes of a motion to dismiss, the pleadings are to be construed liberally. Strauss v. City of Chicago, 760 F.2d 765, 776 (7th Cir. 1985). Furthermore, the court must accept as true all material allegations of the complaint, Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1247 (7th Cir. 1985); and construe the complaint in favor of the complaining party. Worth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 356 (1975); Marco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 385 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985); Ricci v. Chicago Mercantile Exchange, 447 F.2d 713, 715 (7th Cir. 1975). Keeping this deferential standard in mind, the court now turns to the facts alleged by plaintiff in its complaint.

Defendant Conservation Chemical Company of Illinois ("CCCI") is a corporation organized under the laws of the State of Missouri. CCCI owns or operates a hazardous waste facility located at 6500 Industrial Highway, Gary, Indiana ("Gary site" or "Gary facility"), at which hazardous wastes have been generated, stored, treated, and disposed. The Gary facility includes four surface impoundments into which defendants have placed hazardous wastes. Each of the four surface impoundments is a hazardous waste "disposal facility" within the meaning of 320 Indiana Administrative Code ("IAC") 4.1-1-7.

Defendant Norman B. Hjersted, an individual, is the President and principal stockholder of CCCI. At times relevant hereto, Hjersted was responsible for the overall operation of the Gary site. Hjersted directed and controlled expenditures for repairs, improvements, and operations at the Gary site in excess of $500.00 per month and made decisions concerning environmental compliance at the Gary site. Plaintiff maintains that Hjersted is an "operator" of the Gary facility within the meaning of 320 IAC 4.1-1-7.

Section 3005 of RCRA, 42 U.S.C. §6925, generally prohibits the operation of any hazardous waste facility except in accordance with a permit. Section 3005(e) of RCRA, 42 U.S.C. §6925(e), further provides that a hazardous waste facility which was in existence on November 19, 1980 may obtain "interim status" to continue operating until final action is taken by the EPA or an authorized State with respect to its permit application, so long as the facility satisfies certain conditions specified in

that section. Those conditions include filing a timely notice with the EPA that the facility is treating, storing, or disposing of hazardous waste, and filing a timely application for a hazardous waste permit. The owner or operator of a facility with interim status must comply with 40 C.F.R. Part 265 or equivalent state regulations.

Section 213(a) of the Hazardous and Solid Waste Amendments of 1984, P.L. 98-616, 96 Stat. 3221 (codified at 42 U.S.C. §6925(e)(2), provides that by November 8, 1985, the owner or operator of a land disposal facility which was granted interim status by November 8, 1984, shall (a) apply for a final determination of its permit application and (b) certify that the facility is in compliance with all applicable groundwater monitoring and financial responsibiity requirements. Section 3005(e)(2) specifically provides that the failure to meet these requirements shall result in the automatic termination of the land disposal facility's interim status.

Section 3006 of RCRA, 42 U.S.C. §6926, provides that a State may obtain Federal authorization to administer the RCRA hazardous waste management program in that State. On August 18, 1982, U.S. EPA granted to the State of Indiana Phase I interim authorization under Section 3006 of RCRA to carry out certain portions of the RCRA hazardous waste management program in Indiana.

The Gary site is a four-acre parcel of land located in an industrial area of Gary, Indiana. The site is bounded on the

west and southeast by the Elgin, Joliet, and Eastern Railroad ("EJ&E Railroad") rights of way, and on the northeast by a vacant industrial lot. The Gary Municipal Airport borders the site along the southeast side. The Grand Calumet River flows in a northeasterly direction approximately one mile south of the site.

Since April of 1967, materials have been brought to the site for treatment, storage, or disposal. These materials contained cyanide and acids, including spent pickle liquor; drums containing various chemical wastes and halogenated and non-halogenated solvents; separator sludge, and slop oil emulsion solids. These materials are "hazardous wastes" within the meaning of Section 1003(5) of RCRA, 42 U.S.C. §6903(5), and the implementing regulations at 320 IAC 4.1-3.3.

Since April of 1967, the defendants have placed hazardous wastes into the four surface impoundments located at and near the site. The four surface impoundments contain hazardous wastes whose constituents include high concentrations of heavy metals including chromium, cadmium, zinc, mercury, arsenic, and lead. Since April of 1967, the defendants have placed hazardous wastes into tanks located at the site. Hazardous wastes have leaked and spilled from these tanks onto the ground and into surface impoundments at and near the site.

On September 28, 1985, the EPA issued to CCCI and other persons an administrative order pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9606. In the

Administrative Order, the EPA directed respondents to remove and dispose of certain hazardous wastes contained in approximately forty leaking and deteriorating tanks and in several hundred drums at the Gary facility. In addition, the EPA is conducting a response action at the Gary facility, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, in which the EPA is removing several hundred thousand gallons of PCB-contaminated waste oil from the Gary site.

On August 20, 1985, the State of Indiana filed an administrative complaint against CCCI alleging violations of RCRA regulations at the Gary facility, which include the failure to install and implement a groundwater monitoring system, and violations of requirements for inspection and reporting, security, and freeboard and protective cover for surface impoundments. There has been no order for final relief entered in the state's action.

Pursuant to Section 3010(a) of RCRA, 42 U.S.C. §6930(a), on August 18, 1980, the defendants notified the EPA that hazardous wastes were being treated, stored, or disposed at the Gary site. Thereafter, pursuant to Section 3005(a) of RCRA, 42 U.S.C. §6925(a), and 40 C.F.R. §270.10, on November 18, 1980, the defendants submitted the first part ("Part A") of an application for a permit to treat, store or dispose of hazardous wastes at the Gary site.

By virtue of the notification to EPA and the submission of the Part A permit application, the Gary facility was accorded "interim status" under Section 3005(e)(1) of RCRA, 42 U.S.C. §6925(e)(1), which allowed it to continue to operate pending final administrative disposition of the permit application. 40 C.F.R. §270.70(a). As the owners or operators of a hazardous waste facility with "interim status," defendants were required to comply with the Interim Status Standards for Owners and Operators of Hazardous Waste Facilities at 40 C.F.R. Part 265 and, after State authorization, the State regulations which then applied, 320 IAC 4.1 Rules 1 through 32.

Section 3005(e)(2) of RCRA, 42 U.S.C. §6925(e)(2), requires that defendants, as owners or operators of a land disposal facility with interim status, submit the second part, "Part B," of the permit application and certify compliance with the applicable ground-water monitoring and financial responsibility requirements of RCRA on or before November 8, 1985. Section 3005(e)(2) further provides that, if defendants fail to comply with that provision, land disposal units at the facility would lose interim status.

The defendants did not submit any of the certifications required by Section 3005(e)(2) of RCRA, 42 U.S.C. §6925(e)(2). Becaue it failed to make the required certifications, on November 8, 1985, the Gary facility lost its interim status to introduce hazardous waste into the four land disposal units at the Gary site. Pursuant to Section 3005(e)(2) of RCRA, 42

U.S.C. §6925(e)(2) and 320 IAC 4.1-21-1 through 4.1-21-10, defendants are required to submit proper closure and post-closure plans for the four land disposal units to the EPA and the State of Indiana no later than 15 days after termination of interim status. Defendants did not submit proper closure and post-closure plans for the land disposal units at the Gary facility.

The plaintiff EPA brought this action on January 6, 1986, pursuant to its enforcement powers under section 3008(a) of RCRA, 42 U.S.C. §6929(a). By its complaint, the EPA seeks injunctive relief requiring the defendants to comply with the various requirements of both RCRA and corresponding state statutes.

II.

The defendants seek dismissal of certain claims on the grounds that: (a) the claims for injunctive relief have been mooted because of the defendants' cessation of hazardous waste activities, or, in the alternative, that the EPA's enforcement action should be stayed pending the completion of Indiana's administrative enforcement procedure; (b) the EPA has no authority to bring a separate enforcement action concerning closure reuqirements in a RCRA-authorized state like Indiana; and, (c) Hjersted is not personally liable for any of the alleged violations.

A. Mootness and/or a Stay

Defendants argue that their submission of a closure plan and their voluntary cessation of hazardous waste treatment

operations serve to moot the injunctive relief sought by the EPA. In its complaint, the EPA prays for the following relief: (1) a preliminary and permanent injunction enjoining the defendants from introducing, generating, treating, storing or disposing of any hazardous waste at the Gary facility; (2) an order instructing defendants to inventory and account for any assets removed from the Gary facility; (3) an order directing defendants to design and implement a groundwater monitoring system for the Gary facility; (4) an order requiring defendants to comply with the financial responsibility provisions of RCRA; (5) an order instructing defendants to submit closure and post-closure plans for the Gary facility; (6) an order directing defendants to comply with all interim status regulations pending closure of the Gary facility; (7) an order requiring defendants to post bond pending their compliance with the closure and post-closure plans; (8) the imposition of civil penalties of up to $25,000 per day for each of the defendants' violation of RCRA and applicable regulations; and, (9) an award of all costs of this action.

In arguing that the EPA's claims are moot, the defendants rely heavily upon their own statements that they have voluntarily stopped hazardous waste operations. However, it is well established that "voluntary cessation of allegedly illegal conduct does not moot a case" seeking injunctive relief. United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968); Dial v. Coler, 791 F.2d 78, 81 (7th Cir. 1986);

Watkins v. Blinzinger, 789 F.2d 474, 483 (7th Cir. 1985); see also, e.g., Chicago Teachers Union v. Hudson, 106 S.Ct. 1066, 1075 n.14 (1986). A case is not moot unless there is reasonable assurance that the questioned conduct will not be resumed. City of Los Angeles v. Lyons, 461 U.S. 95, 100-01 (1983); Parks v. Pavkovic, 753 F.2d 1397, 1404 (7th Cir. 1985).

The EPA correctly points out that the present storage of hazardous waste at the Gary facility constitutes continuing violations of RCRA's groundwater monitoring, financial responsibility and site security regulations as specified in the EPA's complaint which seeks civil penalties against both defendants because of their past RCRA violations.

"The burden of demonstrating mootness 'is a heavy one,'" County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)), and the court finds that the defendants' assurances are not adequate to convince this court that it is unreasonable to expect future violations. This is especially true insofar as plaintiff's complaint alleges that the mere storage of various wastes at the Gary facility constitutes continuing violations.

Defendants also argue, in the alternative, that this court should stay further proceedings pending the Indiana administrative enforcement process. The court finds it unnecessary to determine whether a stay would be desirable in this case becaue the EPA submitted a copy of a letter, dated February 25, 1986, from the Indiana Attorney General's office informing defendant Hjersted that the Land Pollution Control Division of

the Indiana Environmental Management Board was putting its administrative action "on hold" pending the outcome of the present case before this court.4/ Therefore, there is no need to consider a stay of these proceedings.

B. Enforcement of Closure Plans

Defendants next argue that the EPA lacks enforcement authority to bring this present action concerning closure plans in a RCRA-authorized state like Indiana. Defendants maintain that the EPA has transferred its authority to Indiana and, thus, only Indiana can enforce the closure provisions of its state statutory scheme. In support of this proposition, defendants rely exclusively upon the recent Seventh Circuit decision in Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986). After reviewing the Northside opinion, the court finds that defendants' reliance on Northside is misplaced.

In Northside, the petitioner Northside, a landfill facility providing sanitary and hazardous waste disposal services, sought review before the Seventh Circuit Court of Appeals

---

4/ Although defendants' request for a stay of these proceedings was raised in the context of their motion to dismiss, the court finds that it is not limited to the scope of the pleadings in order to make a proper determination on whether to stay this action. Among the relevant considerations in determining whether to stay a federal suit is the pendency and extent of progress at the state level. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 15-16 (1983); Colorado River Water Conservation District v. United States, 424 U.S. 800, 818-819 (1976); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 740 F.2d 566, 569 (7th Cir. 1984).; 1A J. Moore, Moore's Federal Practice ¶0.203[47] at 2151-54 (1985). Thus the court's acknowledgement and recognition of the Indiana Environmental Management Board's letter concerning the pendency and stage of its proceedings is proper.

under section 7006(b) of RCRA, 42 U.S.C. §6976(b), which provides that "[r]eview of the Administrator's action ... in issuing, denying, modifying, or revoking any permit ... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person."

Specifically, Northside was challenging certain comments made by the Region V Administrator at a public hearing concerning the denial of its Part B permit application. The Regional Administrator, in response to a question raised at the public hearing, stated that hazardous waste had been disposed of in an area of Northside's facility which Northside claimed had not been used for hazardous waste disposal, and, thus, the closure plan for the facility had to address that area. Two months after the public hearing, the Region V Administrator denied Northside's Part B application for failing to provide adequate information. In addition, Northside's interim status was also terminated. Id. at 376. In his order denying Northside's Part B application, the Region V Administrator stated that hazardous waste had been disposed of in the disputed area. The EPA Administrator upheld the Region V determination and Northside sought judicial review pursuant to section 7006(b), 42 U.S.C. §6976(b). Id. at 377.

Northside was not challenging the actual denial of its permit application; rather, it was only attempting to challenge

the EPA's comments concerning the area where Northside allegedly disposed of hazardous waste. The Seventh Circuit dismissed Northside's review petition for lack of standing. The court reasoned that Northside lacked standing to challenge the EPA's comments on the scope of the closure plan because the state of Indiana had been authorized under 42 U.S.C. §6926 to review closure plans. Id. at 382. Indiana received Phase I authorization on August 18, 1982, 47 Fed. Reg. 35970, and, as noted earlier, Phase I authorizes states to conduct closure proceedings for interim status facilities. 40 C.F.R.§265.28. Based on this analysis, the Northside court concluded that the EPA's statements on the scope of closure had no legal effect thus Northside suffered no injury. The court stated:

> The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. § 265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement. Cf. Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978) (EPA recommendation that state deny NPDES variance request constituted advice to state, and was not reviewable in federal court). Hence, in and of itself, the fact that the EPA made comments on the scope of closure in the course of denying Northside's Part B permit application does not constitute an injury to Northside.

804 F.2d at 382. (emphasis added). The defendants here point to the emphasized language in the preceding passage from the Northside opinion as support for their proposition that the EPA has no authority to bring an independent enforcement action in

Indiana. However, defendants misread the court's statement in an attempt to fashion a broad prohibition against the EPA's enforcement authority. The Northside court was not concerned with an enforcement action, instead, it dealt with a party's standing and the EPA's authority under section 7006(b) of RCRA, 42 U.S.C. §6976(b). In this case, unlike Northside, the EPA is acting pursuant to its section 3008(a), 42 U.S.C. §6928(a), enforcement authority.

That the EPA has the power to bring an independent enforcement action, even in a RCRA-authorized state like Indiana, is clear. Section 3008(a) of RCRA, 42 U.S.C. §6928(a), is entitled "Federal enforcement" and provides in paragraph (1):

> (1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. §6928(a)(1).

The one limitation placed upon the EPA's authority to bring an independent enforcement action, which is set out in paragraph (2), speaks directly to the situation in this case; that is, the EPA's auithority to bring an independent enforcement action in a RCRA-authorized state like Indiana.

Paragraph (2) provides:

> (2) In the case of a violatin of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste

> program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

42 U.S.C. §6928(a)(2).

These statutory provisions could not be more clear. Even after a state received authorization to implement its own statutory scheme on hazardous waste "in lieu of the federal program," Congress intended for the EPA to retain independent enforcement authority in those states. When the EPA wishes to bring an action in a RCRA-authorized state, all that is required of the EPA is that it must first notify that state of its intent. At page two of its complaint, the EPA stated: "In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. §6928(a)(2), the State of Indiana has been notified of the commencement of this action."

The legislative history of RCRA echoes the obvious Congressional intent of concurrent federal enforcement.

> This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.

5 U.S. Code Cong. & Admin. News at 6269 (1976)(emphasis added).

This statutory scheme of dual enforcement "serves as an incentive to encourage handlers of hazardous waste to adopt

environmentally sound procedures and to keep states operating their own programs on their toes." R. Andersen, The Resource Conservation and Recovery Act of 1976: Closing the Gap, 1978 Wisc. L. Rev. 635, 664.5/

The language from the Northside case that the defendants here rely on is in accord with the legislative history of RCRA. In Northside, the court stated that as long as the state has acted reasonably in enforcing its program, the EPA should not interfere. 804 F.2d at 382. The portion of the legislative history quoted above underscores the need for state and federal cooperation in implementing hazardous waste laws and explains that the EPA "Administrator is not prohibited from acting in those cases where the state fails to act." 5 U.S. Code Cong. & Admin. News, at 6269 (1976).

In this case, the state did file a separate administrative action against the defendants complaining of many of the same violations alleged by the EPA. However, as discussed previously, the state of Indiana's Environmental Management Board has put its action "on hold" pending the outcome of this suit. Because the state has chosen not to act, there is no prohibition to the EPA bringing this independent enforcement action.

5/ In January of 1986, Indiana was given Phase II authorization by the EPA. In its order, dated January 31, 1986, granting Indiana final authorization, the EPA Administrator stated: "Indiana also has primary enforcement responsibility, although U.S. EPA retains the right to conduct inspections under section 3007 of RCRA and to take enforcement actions under sections 3008, 3013 and 7003 of RCRA." 51 Fed.Reg. 3953, 3954 (emphasis added).

C. Hjersted's Liability

Finally, defendant Hjersted seeks to dismiss plaintiff's complaint on the ground that it fails to state a claim against Hjersted personally. In paragraph five of its complaint, the EPA alleges:

> Defendant Norman B. Hjersted (hereinafter "Hjersted"), an individual, is the President and principal stockholder of CCCI. At times relevant hereto, Hjersted was responsible for the overall operation of the Gary site. Hjersted directed and controlled expenditures for repairs, improvements, and operations at the Gary site in excess of $500.00 per month and made decisions concerning environmental compliance at the Gary site. Hjersted is an "operator" of the Gary facility within the meaning of 320 IAC 4.1-1-7.

In his motion, Hjersted argues that "the only allegation in the complaint regarding his liability is the assertion that he is an 'operator' within the meaning of 320 I.A.C. 4-1-1-7," and that because he is not an "operator" for purposes of the statute, plaintiff's complaint against him should be dismissed. Without deciding whether or not Hjersted is an "operator," the court holds that his reading of the complaint is too narrow.

The EPA's complaint invokes its authority under section 3008(a) of RCRA, 42 U.S.C. 6928(a), which provides that "whenever...any person is in violation of any requirement of [RCRA], the Administrator may...commence a civil action in the United States district court in the district where the violation occurred." There is no requirement that a defendant be an "operator," indeed, the statute says "any person." Hjersted does

not argue that he is not a person for purposes of the law.6/

Moreover, the Eighth Circuit has recently held that corporate officers and employees who actually make corporation decisions can be found personally liable. In United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir. 1986), the court was faced with a similar situation wherein the defendant officers, like the defendant here, argued that only the corporation could be held liable under RCRA. The Northeastern court rejected the defendants' argument and found them personally liable and stated:

> More importantly, imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances.

Id. at 745.

Therefore, because Hjersted is a "person" within the meaning of section 3008(a), 42 U.S.C. §6928(a), and because holding corporate officers liable under RCRA is consonant with Congressional intent, the court finds that the EPA's complaint does sufficiently allege a cause of action against defendant

---

6/ Ind. Code 13-7-1-17, which applies to Indiana's Hazardous Waste Management laws, 320 I.A.C. 4-1-5, defines person as "an individual, partnership, copartnership, firm, company, corporation, association, joint stock company, trust, estate, municipal corporation, city, school city, town, school town, school district, school corporation, county, and consolidated unit of government, political subdivision, state agency, or any other legal entity." Ind. Code 13-7-1-17 (West Supp. 1986-87).

Hjersted; accordingly, the EPA's complaint should survive defendant's motion to dismiss.7/

CONCLUSION

It is, therefore, ORDERED that defendants' motion to dismiss is hereby DENIED.

ENTER: April 23, 1987

JUDGE, UNITED STATES DISTRICT COURT

7/ The court notes that a motion for summary judgment concerning Hjersted's liability, filed by the EPA, is fully briefed and currently pending in this case.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
National-Standard Company (Lake Street Plant) and National-Standard Company (City Complex Plant),	)	Docket No. RCRA-V-W-86-R-30 and Docket No. RCRA-V-W-86-R-31
	)	
	)	
Respondents	)	

4

ORDER

By way of background, and with regard to Docket No. V-W-86-R-30, complainant sought an extension for the serving of prehearing exchanges in a motion of November 26, 1986, which motion was granted by order of December 10, 1986. This was modified by order of December 11, 1986, in which the parties were directed to engage in prehearing exchanges should the matter not be settled by January 26, 1987. In the interim, for the reasons stated in its response served December 12, 1986, respondent opposed the motion. Complainant replied to the response on December 29, 1986. In Docket No. RCRA-V-W-86-R-31, the scenario was essentially the same except that by order of December 11, 1986 the prehearing exchanges were to take place on January 27, 1987.

The arguments raised by the parties in their submissions have been assessed, and they will not be repeated here except to the extent deemed necessary by this order. Citing

Northside Sanitary Landfill, Inc. v. Thomas, 25 ERC 1065, 1073 (7th Cir. 1986), respondent argues that the U.S. Environmental Protection Agency (EPA) no longer has authority to review its Part B permit. In that case, and in pertinent part, the State of Indiana received authorization, pursuant to Section 3006 of the Resource Conservation and Recovery Act (Act), 42 U.S.C. § 2926, to "determine the closure requirements for any facility in that state whose interim status has been terminated by EPA." (emphasis supplied) The holding in Northside is confined to the power of EPA to oversee closure plans in those states given authority to administer same. A fair reading of the case shows it did not come to grips with the broad question concerning the authority of EPA to bring enforcement actions.

The complaint in the subject matters recites that the action is commenced pursuant to Section 3008 of the Act, 42 U.S.C. § 6928. It has been held that Congress did not intend, by authorizing a state program, to preempt Federal regulations entirely. EPA ". . . may exercise Section 3008 powers even where a state program is in effect . . . ." Wyckoff Co. v. E.P.A., 796 F.2d 1197, 1200 (9th Cir. 1986). EPA retains authority to bring this enforcement action against a respondent in the State of Michigan even though this State now has authorization of its programs under the Act.

Complainant's reply raises the question of the interpretation of the last paragraph of the response. The undersigned

also finds its meaning somewhat murky. Respondent seems to be saying that it is prepared to settle the case solely for the proposed civil penalty of $7,475 without any compliance order. If this is the case, settlement negotiations are strictly between the parties, and the undersigned shall not interject himself into same.

IT IS ORDERED that:

1. Complainant's motion for extensions of time to submit prehearing exchanges in the subject dockets is GRANTED. Additionally, the prehearing exchange dates of January 26 and 27, 1987 are extended to February 10, 1987 should the matter not be settled by this latter date.

2. Each party, no later than 10 days of the service date of this order, shall show cause why the subject dockets should not, pursuant to 40 C.F.R. § 22.12, be consolidated.

Frank W. Vanderheyden
Administrative Law Judge

Dated: January 14, 1987
Washington, D.C.

Resp. #4

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NANCY A. MALOLEY, Commissioner

105 South Meridian Street
P.O. Box 6015
Indianapolis 46206-6015
Telephone 317-232-8603

STATE OF INDIANA	)	BEFORE THE SOLID WASTE
	) SS:	MANAGEMENT BOARD
COUNTY OF MARION	)	CAUSE NO. N-53

5

C E R T I F I C A T I O N

I hereby certify that the attached SETTLEMENT AGREEMENT AND RECOMMENDED AGREED ORDER is a true and complete copy of that which was submitted in the matter of Dana Corporation, Inc.

James M. Garrettson
Administrative Law Judge
Indiana Department of
Environmental Management

Subscribed and sworn to before me, a notary public, in and for said County and State, this 8th day of September, 1987.

Carolyn M. Koontz
Notary Public
Carolyn M. Koontz

My Commission Expires: 5-14-88

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE ENVIRONMENTAL MANAGEMENT BOARD OF THE STATE OF INDIANA

IN THE MATTER OF GARY DEVELOPMENT, INC.,

Petitioner,

v.

THE ENVIRONMENTAL MANAGEMENT BOARD OF THE STATE OF INDIANA,

Respondent.

CAUSE NO. N-53

SETTLEMENT AGREEMENT AND RECOMMENDED AGREED ORDER

Comes now Petitioner, Gary Development, Inc., by counsel and by Larry Hagen, Vice President and General Manager; and comes now Respondent, the Indiana Environmental Management Board ("EMB"), by Linley Pearson, Attorney General, by Mathew Scherschel, Deputy Attorney General. The parties show the Hearing Officer that they have resolved their differences and ask the Hearing Officer to recommend an order to EMB in accordance with the terms and conditions set forth in Part II below.

I. HISTORY AND BACKGROUND

In early 1973, Petitioner began to explore developing a sanitary landfill in a mined-out, water-filled, sand pit in Gary, Indiana (hereafter called the "site"). On May 15, 1973, The Indiana Stream Pollution Control Board ("SPCB") approved Petitioner's proposal to dewater the sand pit. On June 19, 1973, SPCB granted Petitioner Construction Permit SW133, thereby allowing preparatory construction work for a sanitary landfill to begin.

On August 29, 1974, the State conducted its final inspection of the site which led to SPCB's granting final approval to Petitioner to commence sanitary landfill operations. The landfill began accepting solid waste for disposal in September, 1974. On February 20, 1975, SPCB sent Petitioner its Operating Permit, No. 45-2.

On May 20, 1980, SPCB approved an Agreed Order negotiated between Petitioner and SPCB staff. This Order required that Petitioner submit within 180 days of May 20, 1980, an application for a modification of its original construction permit. This application was timely submitted to SPCB on November 14, 1980.

On February 16, 1982, the Indiana Environmental Management Board ("EMB": in the interim, EMB replaced SPCB as the Indiana agency responsible for landfill permits) notified Petitioner by two nearly identical letters (hereafter called the "February 16, 1982 letter"), indicating that its Operating Permit No. 45-2 had been renewed and that its revised construction plans submitted November 14, 1980, had been approved, both subject to nine conditions. Petitioner thereafter filed a petition for hearing, contesting the imposition of these nine conditions.

Since that time the parties have negotiated the agreement set forth in Part II below, resolving the issues in dispute. The parties request that the Hearing Officer recommended that EMB enter the provisions of Part II below as an Agreed Order in Cause No. N-53.

II. RECOMMENDED AGREED ORDER

It is expressly agreed and understood that the provisions of this Recommended Agreed Order constitute a modification of Petitioner's modified Construction Permit No. SW133 and Operating Permit No. 45-2. To the extent that this Recommended Agreed Order is inconsistent with these two permits; the drawings and narrative submitted on November 14, 1980; or the State's February 16, 1982 letter, the provisions below shall supercede such inconsistent provisions, and shall govern construction and operations at the site from the date this Recommended Agreed Order is approved by EMB. (This date is hereafter called "the effective date of this Order.")

1. Condition No. 1 in the February 16, 1982 letter, to wit: Sandy, granular material under the unified soil classification SW and SP will not be used for daily cover at the site, remains unchanged.

2. Condition No. 4 in the February 16, 1982 letter is deleted and replaced by the following:

> Petitioner shall notify a staff member of the Indiana Division of Land Pollution Control (hereafter called "staff") by phone at least seven days in advance of the installation of any required leachate collection system on-site, to allow staff to inspect such installation.
>
> a. After such notification, Petitioner may install the system on the appointed day at the appointed hour, or as soon thereafter as weather permits, whether or not staff is present.
>
> b. If staff is not present for such installation, Petitioner shall document with photographs and narrative that the installation complies with Petitioner's amended construction permit.

c. Any required leachate collection system shall be installed in compliance with the amended construction permit.

3. Condition No. 5 in the February 16, 1982 letter regarding the discharge of water from the site into the Grand Calument River or other waters of the State of Indiana is deleted in its entirety.

4. Condition No. 6 in the February 16, 1982 letter is deleted and replaced by the following:

It is not necessary that Petitioner install the seepage collection pond detailed on page seven of Petitioner's Engineering Plan. Petitioner agrees that no solid waste will be deposited in "standing water;" the phrase "standing water" *shall not be construed to mean* de minimus amounts of water or small rain-filled puddles.

5. Condition No. 7 in the February 16, 1982 letter is deleted and replaced by the following:

The Clay Perimeter Seal along the southside of the site shall be constructed to an elevation of 589.7 MSL and shall be at least 10 feet wide. The parties expressly agree that the portion of Petitioner's landfill located at the southeastern portion of the site which is completed and at final grade as of December 14, 1982, will not be affected by this requirement.

6. Condition No. 8 in the February 16, 1982 letter is deleted and replaced by the following:

The four on-site monitoring wells will be sampled on a quarterly basis. The sampling months are January, April, July, and October, with samples to be taken at the end of each month and analyzed.

a. Results of these tests shall be submitted to staff by the end of the following month. The parameters to be tested are chloride,

chemical oxygen demand, total hardness, total iron, and total dissolved solids.

b. Petitioner agrees to locate and reactivate or replace the one monitoring well shown in its construction plans to be located along the eastern boundry of the site, if it is physically possible to do so.

7. The modified construction plans approved February 16, 1982, called for compaction of the clay perimeter wall around the site and testing the clay used for constructing this wall in accordance with the 90% Standard Proctor Density Test. Petitioner has found it technically and economically impractical to utilize this test. Respondent has agreed to substitute for this test any test acceptable to staff which will accurately portray the permeability of the clay perimeter wall. Accordingly, Conditions two and three of the February 16, 1982, letter are deleted and replaced with the following:

a. Within 45 days of the effective date of this Order, or if weather conditions prevent taking the borings within this time period, as soon thereafter as weather permits, Petitioner will have four soil borings (which may be drilled at an angle) taken from the site's west wall, at random locations along the wall, with split spoon samples taken at five foot depth intervals in each boring. Blowcounts will be recorded for each split spoon sample taken. The soil boring team will visually inspect the split spoon samples taken from each hole drilled and keep a log of their observations to include any identifiable irregularities or voids encountered during drilling. A total of five Shelby tube samples shall be taken from the borings. The Shelby tube samples will be subjected to a hydraulic conductivity test to ascertain the samples' permeability. Test results will be forwarded to staff within 15 days of their receipt by Petitioner. Staff shall be notified at least seven days in advance of any such boring, and will be given an opportunity to attend and view the drilling. Staff shall not interfere with such operations.

b. If the test results show the permeability of the clay wall to be 5.0×10^{-6} centimeters per second or less (i.e. 4.9×10^{-6}, 4.0×10^{-6}, 3.0×10^{-6}, 2.0×10^{-6}, 1.0×10^{-6}, 1.0×10^{-7}, 1.0×10^{-8}, etc.), then no remedial action for the west clay

perimeter wall will be required unless Staff identifies a significant infiltration of liquid as discussed in subparagraph 7c.

c. If the test results show that the permeability of the west perimeter wall is 5.1×10^{-6} centimeters per second or greater (i.e. 5.1×10^{-6}, 6.0×10^{-6}, 7.0×10^{-6}, 8.0×10^{-6}, 9.0×10^{-6}, 1.0×10^{-5}, 1.0×10^{-4}, etc.); or if Staff identifies a significant infiltration problem involving a concentrated flow of liquid into the site through the west wall or emanating from an area of deposited solid waste along that wall, then it is agreed that further negotiations between the parties will be required to determine what remedial action, if any, must be undertaken along the west wall. If the parties are unable to reach an agreement as to such remedial measures, if any, within 60 days of (i) the submission of the test results to the State, or (ii) the date a significant infiltration of liquid, Staff notifies Petitioner in writing of a finding of the issue of what remedial action may be required shall be submitted to the Hearing Officer for hearing and decision.

d. Until the soil boring tests are completed with satisfactory results in accordance with subparagraphs "a" and "b" above; or until an agreement is approved, or order entered pursuant to subparagraph "c" above, Petitioner agrees not to construct any further portions of the clay perimeter wall around the site.

i. If said test results are satisfactory in accordance with subparagraphs 7b, and no significant infiltration of liquid is identified in accordance with subparagraph 7c, then construction of the remaining portions of the clay perimeter wall shall proceed in the same manner as the construction of the west wall so as to ensure a permeability factor at least equivalent to the test results for the west wall and to ensure that infiltration of liquid into the site through these newly constructed walls does not occur. In this event, Petitioner will submit narrative to staff describing the method used to construct the west wall and will document the construction of the remaining portions of the clay perimeter wall with pictures and narrative to ensure consistent construction practices.

ii. If said test results are unsatisfactory, or a significant infiltration of liquid is identified in accordance with subparagraph 7c, the parties will attempt to negotiate an acceptable alternative for the construction of the remaining portions of the clay perimeter wall, or failing an

agreement, submit the matter to the Hearing Officer for hearing and decision.

8. Condition nine of the February 16, 1982, letter is deleted and replaced by the following:

a. Petitioner's landfill will not be excluded from consideration as, and will be considered, one of the several sanitary landfills in Indiana which are, satisfactory repositories for special or "hazardous waste" as defined in 320 I.A.C. 5-2-1(19) (1982 Cum. Supp.) (hereafter called "special waste"). The parties specifically agree that no "hazardous waste" as defined and identified in 320 I.A.C. 4-3 (1982 Cum. Supp.) (hereafter called "RCRA hazardous waste") shall be deposited at Petitioner's landfill after the effective date of this Order.

b. Petitioner shall be permitted to continue receiving the following "special wastes" from the effective date of this Order until further action of the Board or Staff:

1. U.S. Reduction Dust;
2. Asbestos fill from Borg-Warner and Amoco Oil (which waste streams were subject to Special Permission letters dated 5/17/77 and 5/14/80, respectively);
3. Corn Starch and carbon filters from American Maize Products Company (which waste streams were subject to a Special Permission letter dated 2/20/76);
4. The following steel mill sludges from J & L Steel Corporation: the Central Treatment Plant Sludge, the Terminal Treatment Plant Sludge, and the Sludge from the 6 Stand Oil Recovery Unit.

c. After the effective date of this Order, staff will send a letter to the generators of the special wastes listed in subparagraph b above, requesting that the generators submit further information regarding the nature of the waste streams identified in subparagraph 8b above, to staff within 60 days of receipt of such letter; it is expressly agreed that this 60 day period will be extended by staff for good cause shown. Staff will analyze such updated information, make a final determination whether these listed special wastes may continue to be disposed of at the site, and shall promptly notify the generator of the waste and Petitioner of its decision. Any such decision shall constitute a "final action" for which Petitioner may file a Petition For Hearing before the Board pursuant to IND. CODE SS 4-22-1 (1982) and 13-7-11-3 (1982). Any

special permission letters issued for these listed wastes shall last one year. Renewal of such letters will be granted if the materials do not change significantly in quality or quantity, and if Petitioner's operation of the site is in compliance with this Agreed Order, and Petitioner's modified construction permit and operating permit.

d. It is the parties' intention that other "special wastes" of similar quality, quantity and composition as; and other "special wastes" presenting similar environmental hazards as, the above-listed special wastes will be considered for disposal at the site. The decision whether to allow "special wastes" in addition to those listed above to be deposited at Petitioner's site, must be made by staff on a case-by-case basis after considering the physical and chemical composition of the proposed waste as well as current operations at the site. Although it is impossible to make any guarantees in advance, staff agrees in principle that, given satisfactory operations and construction at the site in compliance with this Order; Operating Permit 45-2; and the modified construction plans approved Febuary 16, 1982, waste streams with similar chemical and physical composition, and waste streams presenting similar environmental hazards as the special wastes listed in subparagraph "b" above, will be considered suitable for disposal at the site.

e. The parties agree that materials such as debris, wood, construction refuse, steel, etc.; "coal ash" including fly ash and bottom ash (i.e. the resultant "ash" from coal burning); may be disposed of at the site without any special permission letters.

f. Petitioner agrees to submit a quarterly report to staff setting forth the types and amounts of "special wastes" disposed of at the site. These reports will be due the same day for the same period as the monitoring well reports referred to in paragraph 6 above.

g. Finally, the parties agree to cooperate in good faith in exploring the possibility of depositing the Georgia Pacific paper sludges and municipal treatment plant sludges at the site.

9. The parties agree that Petitioner's Operating Permit and amended Construction Permit shall last for a period of two years from the effective date of this Agreed Order. The renewal of this Operating Permit and amended Construction Permit, or the decision of whether to grant or renew special permission

letters referred to in paragraph 8b, 8c and 8d above, shall be based upon Petitioner's compliance with this Agreed Order, Petitioner's modified construction permit and operating permit and IND. CODE § 13-7. For the purpose of renewals of existing special permission letters (subparagraph 8c), granting and renewal of additional special permission letters (subparagraph 8d), and the renewal of Petitioner's Operating Permit and amended Construction Permit (paragraph 9), the phrase "compliance with this Agreed Order, Petitioner's modified construction permit and operating permit" shall include but not be limited to (1) any de minimus or insignificant variations from the Agreed Order and/or Petitioner's modified construction permit and operating permit, and/or (2) any inspection report which contains demerits, but which still shows an "acceptable" rating, and/or (3) any unacceptable rating on 40 percent or less of the inspection reports conducted by the State in any 12 month period.

Petitioner, Gary Development, Inc.

By Lawrence H. Hagen
Lawrence Hagen, Vice President & General Manager

Date: 2/14/83

By John M. Kyle III
John M. Kyle III

INDIANA ENVIRONMENTAL MANAGEMENT BOARD

Technical Recommendation

By David D. Lamm
David D. Lamm, Director
Division of Land Pollution Control

Date: 2/16/83

Approved For Legality And Form

Linley E. Pearson
Attorney General of Indiana

By Mathew S. Scherschel
Mathew S. Scherschel
Deputy Attorney General

Date: 2/16/83

By E. Victor Indiano

Barnes & Thornburg
Attorneys for Petitioner

Date: February 9, 1983

Recommendation For Adoption

By _____
Hearing Officer

Date: 2-16-83

Indiana Environmental Management Board

By _____
Ralph Pickard, Technical Secretary

Date: February 28 1983